QM Resources Sdn Bhd v Parade Hotel Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO J-02(NCVC)(W)-771–04 OF 2017
HAMID SULTAN, ABANG ISKANDAR, MARY LIM JJCA
11 SEPTEMBER 2019

Evidence — Burden of proof — Person who alleged fact had to prove it — Plaintiff obtained property via public auction — Defendants alleged that commercial units on ground floor of the property were not part of auctioned property — High Court judge placed burden of proof on plaintiff to prove that the commercial units did not constitute part of the auctioned property — Whether High Court judge had properly placed burden of proof on respective parties — Whether defendants' case proven — Evidence Act 1950 ss 101 & 106

Land Law — Ownership — Dispute — Plaintiff obtained property via public auction — Defendants claimed ownership of commercial units situated on ground floor of plaintiff's auctioned property — High Court judge placed burden of proof on plaintiff to prove that the commercial units did not constitute part of the auctioned property — Whether commercial units included in proclamation of sale and order for sale — Whether High Court judge had properly placed burden of proof on respective parties — Whether defendants were lawful owners of commercial units

The plaintiff was the successful bidder of a building whereas the defendants claimed that they were the lawful owners of Units G, G1, G2 and G4 located in the building as they had purchased the said units from the developer prior to the public auction. The plaintiff had brought an action at the High Court for a declaration that the plaintiff had the legal or beneficial rights on the ground floor of the said building. In its counterclaim, the first defendant sought a declaration that the first defendant was the lawful owner of lot G of the said building whereas the second and third defendants merely denied the plaintiff's claim. The High Court found in favour of the defendants, hence, the present appeal. The issue for the court's determination was whether the learned High Court judge ('HCJ') had properly placed the burden of proof on the respective parties.

Held, allowing the appeal with costs:

(1) In the present case, the plaintiff was claiming that the building that it had successfully purchased at the public auction had comprised the property as described in the proclamation of sale ('POS'). Nevertheless, the learned HCJ had agreed with the contention of the defendants that as the

plaintiff had alleged that the defendants' units were included in the sale, the burden was on the plaintiff to prove the same by calling the relevant witnesses. Based on the judgment of the HCJ, it was clear that the HCJ had placed the burden on the plaintiff to prove a material fact that was not part of the narrative of his case against the defendants. It must be remembered that the plaintiff was a successful bidder in an auction pursuant to a judicial sale relating to a property as described in the POS, as such, it was entitled to act on that public document (see paras 21, 23 & 25).

(2) Section 101 of the Evidence Act 1950 ('the EA') states that one who alleges a fact had a burden of proving it and s 106 of the EA provides that if a particular fact is within the special knowledge of a person, then he must prove such fact. As the defendants had asserted material fact that their units on the ground floor in the building ought not to be included in the sale as publicly proclaimed pursuant to the POS, it was therefore incumbent on them to prove that material facts. The burden was on the defendants to prove that their units were exempted or excluded from the sale, not on the plaintiff (see paras 29 & 31).

(3) Looking at the POS, there was no express provision therein that had spelt out units in the building which were to be excluded in the sale. Instead, via its provision on 'Description' it had expanded the scope of the sale to further include certain units which were specifically identified therein. In the context of this case, the defendants' units were not mentioned in the 'including' phrase because it was already part of the building that was meant to be sold off. Further, based on the order for sale, no units on the ground floor were excluded from the sale. As such, there was no basis for the defendants to allege that their units that existed on the ground floor of the building did not form part of the building subject to be sold. Further, in view of the judicial sale and the POS, it was obvious that the learned HCJ was functus officio in the sense that it could no go against the order for sale which had the effect of authorising the sale of the property as described in the POS (see paras 37–38, 41, 43 & 52).

(4) It was also not in dispute that a certificate of sale (Form 16F) had been issued by the court to the plaintiff, who had paid the full purchase price for the property. Form 16F was registrable as an instrument of dealing and had the effect of vesting the title to the property that he purchased at the public auction, pursuant to s 267(1) read with s 259(3) of the National Land Code. In the absence of any voiding or vitiating factors, the plaintiff obtained a good and indefeasible title in the property that he had purchased at the public auction (see para 48).

(5) The maxim 'expressio unius est excluso alterious' had no application in the circumstances of the present case. As the defendants failed to prove that their units ought to be excluded from the public auction of the

building, they had failed to prove their case as they had failed to call witnesses to help establish their case (see para 44).

(6) By entering into the sale and purchase agreement with the developer, knowing fully well the status of the titles to the properties, the defendants knew the risk involved and they took that risk. They had no defence against a claim mounted by the plaintiff whose claim to ownership of the auctioned property was founded upon sterner and firmer statutory ground (see para 54).

(7) In light of the fact that the plaintiff had a better title in the property he had purchased in the public auction, it would be impossible for the learned HCJ to exercise his discretion by granting the declaration that was sought for by the first defendant in its counterclaim (see para 55).

[Bahasa Malaysia summary

Plaintif adalah pembida bangunan yang berjaya memenangi bidaan manakala defendan-defendan mendakwa bahawa mereka adalah pemilik sah Unit G, G1, G2 dan G4 yang terletak di dalam bangunan tersebut kerana mereka telah membeli unit tersebut dari pemaju sebelum lelongan awam. Plaintif telah memfailkan tuntutan di Mahkamah Tinggi untuk menyatakan bahawa plaintif mempunyai hak sah atau hak sebagai penerima manfaat ke atas tingkat bawah bangunan tersebut. Dalam tuntutan balasnya, defendan pertama memohon pengisytiharan bahawa defendan pertama adalah pemilik sah lot G bangunan tersebut manakala defendan kedua dan ketiga hanya menafikan tuntutan plaintif. Mahkamah Tinggi berpihak kepada defendan-defendan, oleh itu, rayuan semasa. Isu bagi penentuan mahkamah adalah sama ada hakim Mahkamah Tinggi yang bijaksana ('HMT') telah meletakkan beban pembuktian dengan tepat ke atas pihak-pihak.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam kes semasa, plaintif mendakwa bahawa bangunan yang berjaya dibeli semasa lelongan awam tersebut merangkumi harta tanah seperti yang dijelaskan dalam pernyataan penjualan ('PP'). Walaupun begitu, HMT yang bijaksana telah bersetuju dengan pendapat defendan-defendan bahawa memandangkan plaintif telah mendakwa bahawa unit-unit defendan-defendan termasuk dalam penjualan, beban pembuktian adalah di pihak plaintif untuk membuktikan hal yang sama dengan memanggil saksi-saksi yang berkenaan. Berdasarkan keputusan HMT, jelas bahawa HMT telah meletakkan beban ke atas plaintif untuk membuktikan fakta material yang bukan merupakan sebahagian dari naratif kesnya terhadap defendan-defendan. Harus diingat bahawa plaintif adalah pembida yang berjaya dalam lelongan berdasarkan penjualan kehakiman yang berkaitan dengan harta seperti yang dijelaskan dalam PP, oleh itu, ia berhak untuk bertindak atas dokumen

umum tersebut (lihat perenggan 21, 23 & 25).

(2) Seksyen 101 Akta Keterangan 1950 ('AK') menyatakan bahawa seseorang yang menyatakan suatu fakta mempunyai beban untuk membuktikannya dan s 106 AK memperuntukkan bahawa jika suatu fakta tertentu berada dalam pengetahuan khusus seseorang, maka dia mesti membuktikan fakta tersebut. Oleh kerana defendan-defendan telah menyatakan fakta material bahawa unit mereka di tingkat bawah bangunan tidak boleh dimasukkan dalam penjualan seperti yang diumumkan secara terbuka menurut PP, oleh itu mereka harus membuktikan fakta-fakta material tersebut. Beban ditanggung oleh defendan-defendan untuk membuktikan bahawa unit mereka dikecualikan daripada penjualan, bukan pada pihak plaintif (lihat perenggan 29 & 31).

(3) Melihat kepada PP, tidak ada peruntukan yang jelas di dalamnya yang menyatakan unit-unit di dalam bangunan itu tidak termasuk dalam penjualan. Sebaliknya, melalui peruntukannya mengenai 'Description', ia telah memperluas ruang lingkup penjualan untuk memasukkan unit-unit tertentu yang secara khusus dikenal pasti di dalamnya. Dalam konteks kes ini, unit defendan-defendan tidak disebut dalam frasa 'termasuk' kerana ianya sudah menjadi sebahagian dari bangunan yang hendak dijual. Selanjutnya, berdasarkan perintah penjualan, tidak ada unit di tingkat bawah yang dikecualikan dari penjualan. Oleh itu, tidak ada dasar bagi defendan-defendan untuk mendakwa bahawa unit mereka yang berada di tingkat bawah bangunan tidak termasuk dalam sebahagian bangunan yang boleh dijual. Selanjutnya, melihat kepada penjualan kehakiman dan PP, jelas bahawa HMT yang bijaksana adalah functus officio memandangkan ia tidak boleh melanggar Perintah Penjualan yang mempunyai kesan membenarkan penjualan harta tanah seperti yang dijelaskan di dalam PP (lihat perenggan 37–38, 41, 43 & 52).

(4) Tidak dinafikan juga bahawa sijil perakuan penjualan (Borang 16F) telah dikeluarkan oleh mahkamah kepada plaintif, yang telah membayar harga pembelian penuh untuk harta tersebut. Borang 16F dapat didaftarkan sebagai instrumen urus niaga dan mempunyai kesan menyerahkan hak milik harta yang dibelinya dalam lelongan awam tersebut, berdasarkan s 267(1) yang dibaca dengan s 259(3) Kanun Tanah Negara. Sekiranya tidak ada faktor pembatalan atau vitiasi, plaintif memperoleh hak yang baik dan tidak dapat disangkal ke atas harta yang dibelinya semasa lelongan awam tersebut (lihat perenggan 48).

(5) Maxim 'expressio unius est excluso alterious' tidak terpakai di dalam keadaan kes ini. Oleh kerana defendan-defendan gagal membuktikan bahawa unit-unit mereka seharusnya dikeluarkan dari lelongan awam bangunan tersebut, mereka gagal membuktikan kes mereka kerana

mereka gagal memanggil saksi-saksi untuk membantu membuktikan kes mereka (lihat perenggan 44).

(6) Dengan memasuki perjanjian jual beli dengan pemaju, dengan mengetahui sepenuhnya status hak milik ke atas harta tanah tersebut, defendan-defendan mengetahui risiko yang terlibat dan mereka telah mengambil risiko tersebut. Mereka tidak memiliki pembelaan terhadap tuntutan yang diajukan oleh plaintif yang tuntutannya bagi pemilikan harta yang dilelong tersebut didasarkan pada alasan undang-undang yang lebih kukuh dan tegas (lihat perenggan 54).

(7) Berdasarkan fakta bahawa plaintif mempunyai hak milik yang lebih baik dalam harta yang dibelinya dalam lelongan awam tersebut, mustahil bagi HMT yang bijaksana untuk menggunakan budi bicaranya dengan memberikan deklarasi yang dimohon oleh defendan pertama di dalam tuntutan balasnya (lihat perenggan 55).]

Cases referred to

Foo Tseh Wan v Toyota Tsusho (M) Sdn Bhd & Anor [2018] 9 MLJ 664, HC (distd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650, SC (folld)

Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)

Hong Leong Bank Bhd v Tan Siew Nam & Anor [2014] 5 MLJ 34, CA (refd)

Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd') [2016] 2 MLJ 819, CA (folld)

Song Lian Chye & Ors v Tai Kian Cheong t/a Tai Kian Cheong & Co [1983] 2 MLJ 222, FC (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd [2016] MLJU 1333; [2017] 2 MLRA 578, CA (folld)

Legislation referred to

Evidence Act 1950 ss 101, 106
Malaysian Anti-Corruption Act 2009 s 53, 53(1)
National Land Code ss 259(3), 267(1), Form 16F

Appeal from: Civil Suit No 22NCVC-227–10 of 2013 (High Court, Johor Bahru)

John Mathew (Heng Yee Keat with him) (Christopher & Lee Ong) for the appellant.

Dinesh Athinarayanan (Dinesh & Co) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

SALIENT FACTS OF THE CASE

[1] This case is concerned with a dispute over who is the rightful owner of several commercial units/lots on the ground floor of a building. The building was erected on two pieces of land at Kota Tinggi, Johor. Although the units in the building had been sold to various parties, the building, which was intended to be a hotel, was later left abandoned. It was also an undisputed fact that the land on which the building stood ('the said property') was charged to the lending bank which had provided financial facility to chargor.

[2] On 21 October 2010, the said property was put up for sale in a public auction, and QM Resources Sdn Bhd ('the plaintiff') was the successful bidder at the auction. The plaintiff had paid a sum of RM5,123,000 for the said property.

[3] After the plaintiff had acquired the said property through the auction, Parade Hotel Sdn Bhd ('first defendant'), Poon Kheng Chan ('the second defendant, and Kang Rong Ye ('the third defendant') (collectively known as 'the defendants') notified the plaintiff that they were the lawful owners of several commercial units/lots namely Units G, G1, G2 and G4 ('the impugned units') located at the ground floor of the said building. The defendants asserted that the units were excluded from the sale in the auction, therefore, the plaintiff did not acquire the legal right for the units.

[4] The said property was initially owned by Rinting Tenggara Sdn Bhd ('Rinting Tenggara'). Rinting Tenggara was wound up on 15 January 1998. The said property was charged to CIMB Bank, and put up for auction by Sinesinga Sdh Bhd in which the plaintiff was the successful bidder.

[5] The defendants pleaded that prior to 15 December 1998, the developer had entered into three sale and purchase agreements ('SPA') with the first defendant whereby the developer agreed to sell and the first defendant agreed to purchase the unit at the ground floor.

[6] The first defendant took a loan but defaulted in paying. The defaulted loan was later taken over by Danaharta Managers Sdn Bhd. Danaharta later sold the two charged lots (G1 and G2) to one Kang Sin Wil on 12 March 2007. Subsequently, on 11 May 2012, Kang Sin Wil assigned his rights in lots G1 and G2 to the third defendant.

[7] With regards to the third SPA, the first defendant sold it to the second defendant on 25 July 2011. A

[8] The first defendant in its counterclaim sought, among others, a declaration that the first defendant was the lawful and rightful owner of lot G with floor space measuring 5,445 sqft on the ground floor of the said building. B

[9] The second and third defendants did not seek any declaration, instead they merely denied and refuted the plaintiff's claim for a declaration that the plaintiff had the legal or beneficial rights to the ground floor of the said building. C

FINDINGS OF LEARNED HIGH COURT JUDGE

[10] After a full trial, the learned High Court judge ('the HCJ') dismissed the plaintiff's claim and allowed the first defendant's counterclaim. Hence, the plaintiff had since filed its appeal for this court's consideration. D

THE APPEAL

E

[11] Upon hearing this appeal on 28 June 2018, we indicated to parties that we needed further submissions on the issues which will later be enumerated. Parties had filed in further written submissions and we had reserved our decision of this appeal to a later date. This is now our decision and our reasons for having so decided. F

[12] Before us, the plaintiff's complaints were:

(a) the order for sale clearly shows that the impugned units were in fact part of the said property that was put up for public auction. Therefore, the plaintiff, being the successful bidder at the public auction was the beneficial and legal owner of the impugned units; G

(b) the learned HCJ is functus officio and has no power to set aside the order for sale; H

(c) the proclamation of sale shows that the impugned units were part of the said property and therefore, part of the auctioned property that was successfully bought by the plaintiff; and

(d) the indefeasibility of the chargee's interest and correspondingly the indefeasibility of the interest of the successful bidder (plaintiff). I

[13] As alluded to earlier above, we indicated to parties that we needed further ventilation on the following issues, namely:

A (a) whether the ownership right of a successful bidder (the plaintiff) obtained through a judicial sale/public auction conducted by the court pursuant to the National Land Code (*statutory right*) prevails over the right of a purchaser (the defendants) following the purchase from the charger/developer prior to the auction sale (*personal right*)? and

B (b) whether the first defendant is entitled to the declaration (as sought by the first defendant in the counterclaim and granted by the High Court)?

OUR DELIBERATIONS AND FINDINGS

C **[14]** Having read the grounds of judgment of the learned HCJ, it was apparent that the claim filed by the plaintiff in this case was dismissed after a full trial, on account of the fact that the plaintiff had failed to prove its case on the balance of probabilities, against all the defendants. In para 43 of the D grounds of judgment, the learned HCJ had written like so:

> [43] Based on the above reasoning, this court found the plaintiff did not succeed in proving its case, and therefore, the plaintiff's claims against all the defendants were dismissed with costs of RM10,000 to be paid to each of the defendants by the plaintiff.

E

[15] During the pendency of the hearing of that appeal, the plaintiff had filed a notice of motion in encl 4a with a view of adducing fresh evidence in the form of the order for sale dated 28 September 2004. That motion was allowed F subject to the right of parties to submit on why it was not tendered during the trial of this case before the learned HCJ in the court below.

[16] Having perused through the records of appeal, in particular, the grounds of judgment of the HCJ, we are of the view that much of this case also G had turned on whether the learned HCJ had properly placed the burden of proof on the respective litigating parties. We shall deal with that matter first.

[17] He had opined in his grounds of judgment that the issue for consideration before him was who rightfully owned the impugned units on the H ground floor of the building that was the subject-matter of the judicial sale by way of auction, pursuant to the proclamation of sale (P3).

[18] It must not be forgotten that the plaintiff's claim was based on the fact I that he had obtained the said property in which the defendants' claimed commercial units on the ground floor were situated. It was the defendants' case that their units were not part and parcel of the building because their units were not included as units to be sold off in the judicial sale by way of a public auction.

[19] We now revert to the matter of placement of the burden of proof by the learned HCJ. He had stated in his grounds of judgment as can be seen at para 26 therein, like so:

> The plaintiff asserted that it had purchased the whole of the ground floor, including the commercial units/lots located at the ground floor in the auction. The plaintiff bears the burden of proving such asserted fact. Unfortunately, the plaintiff did not adduce any evidence to prove the auction property had included the commercial units/lots at the ground floor.

[20] That was not the only instance that the learned HCJ had emphasised the fact that the plaintiff had the burden of establishing that the impugned units claimed by the defendants to be theirs, were in fact exempted or excised from forming part of the building/said property that was up for auction via the proclamation of sale.

[21] In this regard, we need to appreciate what the plaintiff was claiming for from the court. It was claiming that the building that it had successfully purchased at the public auction by being the successful bidder, had comprised the property as described in the proclamation of sale (see pp 80–81: 82–96 of *Ikatan Teras Bersama, Jld* 1). That description of the property had stated as follows:

> The property comprises two (2) adjoining parcels of commercial land erected upon with an abandoned nine (9) storey building which was previously known as Apollo Riverview Hotel bearing postal address as No. 264 Jalan Besar, 81900 Kota Tinggi, Johor (*including four (4) unit of shops: First floor — F8, F9 & F18. Second floor — S9*). (Emphasis added.)

[22] From a perusal of these documents forming the proclamation of sale of the property in question, one feature was conspicuous by its absence. That feature being the fact that there was *no express exemption* of any units from any floor in the building that were singled out as being exempted from the intended sale by way of auction. On the contrary, the proclamation of sale document at p 83 *Ikatan Teras Bersama, Jld* 1, had expressly declared that the sale would *include* the specified units identified as four units of shops which were situated on the first floor namely F8, F9 and F18 and on the second floor, it was unit S9.

[23] In light of this scenario, the defendants had through their learned counsel submitted before the learned HCJ that as the proclamation of sale did not single their units on the ground floor of the building as being *included* in the sale, it must be taken to mean that their units were not intended to form part of the building that was up for the sale. It was their contention that as the plaintiff had alleged that the defendants' units were included in the sale, the burden was on the plaintiff to prove the same by calling the relevant witnesses.

[24] The learned HCJ agreed with the defendants' contention. To appreciate the decision of the learned HCJ, we reproduce the relevant paragraphs in his grounds of judgment, below:

> [24] The proclamation of sale had specifically singled out four commercial units which were included in the auction property. They were units F8, F9 and F18 on the first floor and S9 on the second floor. The commercial units/lots at the ground floor were not included in the description of the auction property in the proclamation of sale.
>
> [25] The non-inclusion of the commercial units/lots at the ground floor indicates that those units/lots were intentionally left out as part of the auction property. If they were intended to be part of the auction property, the description in the proclamation of sale would have included them, just like units F8, F9, F18 and S9.
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> [26] The plaintiff asserted that it had purchased the whole of the ground floor, including the commercial units/lots located at the ground floor in the auction. The plaintiff bears the burden of proving such asserted fact. Unfortunately, the plaintiff did not adduce any evidence to prove the auction property had included the commercial units/lots at the ground floor.
>
> [27] The plaintiff did not call any one from Sinesinga Sdn Bhd or the licenced auctioneer Sua Chong Yew as witnesses during trial to testify to prove the fact that the commercial units/lots at the ground floor were included as part of the auction property. The plaintiff also did not call any solicitor from the firm of solicitors, Messrs Shaikh David Raj, the solicitors acting for the Sinesinga Sdn Bhd, as a witness to testify and explain what the auction property encompassed.
>
> [28] A representative from Sinesinga Sdn Bhd could have explained the property that was vested in the company and put up as the auction property in the auction. The plaintiff did not adduce any evidence of the vesting order and court order for sale of the auction property in the trial. Therefore, this Court, after having considered the available evidence before it, was unable to make a finding of fact or even make an inference from available evidence that the commercial units/lots on the ground floor of the said building were included as part of the auction property.
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> [29] Secondly, whether the defendants acquired any legal and/or beneficial rights over the units (G, G1, G2 and Coffee House/Lounge)? The answer to the question would be affirmative. This Court, after having perused through the evidence adduced before it, was satisfied that the following facts were established in the defendants' case:
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> (i) The first defendant had indeed purchased the said units from the Developer (see: the first SPA dated 6.9.1995 for unit 'G' (D36); the second SPA dated 6.9.1995 for the unit 'G2' (IDD38); and the third SPA dated 25.11.1996 for the Coffee House/Lounge (D51);
>
> (ii) The first defendant sold the Coffee House/Lounge to second defendant (see Sale and Purchase Agreement dated 25.7.2011 (D53) and the Deed of Assignment (D67));
>
> (iii) Kang Sin Wil had assigned his rights in 'G1' and 'G2' to the third defendant (see Deed of Assignment dated 11.5.2011 (D52)).

[30] The counsel for the plaintiff had challenged the contents of the above documents, but could not rely on any legal ground to do so. Therefore, this court had accepted the contents of the above documents as correct.

[31] Based on the above documents, the end result of the ownership of the said units are as below:

(a) Unit 'G' (measuring 5,445 sqft) belongs to first defendant;

(b) Unit Coffee House/Lounge (measuring 2,000 sqft) belongs to second defendant; and

(c) Unit 'G2' (measuring 306 sqft) and 'G1' (measuring 2000 sqft) belongs to third defendant.

[25] From a perusal of the above-quoted paragraphs, it is clear that the learned HCJ had placed the burden on the plaintiff to prove a *material fact* that was not part of the narrative of his case against the defendants. It must be remembered that the plaintiff was a successful bidder in an auction pursuant to a judicial sale relating to a property as described in the proclamation of sale (P3). It was therefore entitled to act on *that public document that was concerned with a sale of a property which 'will be sold under the supervision of the Deputy Registrar, High Court, Johor Bahru, Johor with the Assistance of the Licensed Auctioneer mentioned below:* ... (see p 82 of *Ikatan Teras Bersama, Jld* 1). (Emphasis added.)

[26] It must also be recalled that the 'Syarat-syarat Jualan' had included, among others, item 11 which stated as follows:

Harta itu adalah dipercayai dan akan dianggap sebagai diperihalkan dengan betul dan dijual tertaluk kepada semua ismen, kaveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk menakrif ia masing-masing dan tiada kesilapan kenyataan yang salah atau deskripsi yang salah akan membatalkan penjualan dan tiada bayaran gantirugi yang akan dibuat (see page 84, *Ikatan Teras Bersama, Jilid* 1).

[27] Based on the above stipulations in P3, the plaintiff had put in his bid at the said public auction and it was successful. It was entitled to get the auctioned property on the *as is* basis as described in the P3 without more. It was not incumbent on the plaintiff to do any further checks on the property such as to inquire whether part of the property to be auctioned had belonged to some other persons. It was entitled to act on the proclamation of sale, a sale that was to be supervised by a court official, to wit, 'the Deputy Registrar, High Court, Johor Bahru, Johor'.

[28] Be that as it may, the evidence adduced before the learned HCJ did show that the plaintiff did check on the property at the Land Office before bidding for it and noted the presence of some caveats but none had originated

from the defendants. Item 11 above is a saving clause in favour of the plaintiff as the successful purchaser of the property in that nothing will void the sale of the property to him on account of any of the matters mentioned in item 1. In other words, it is immune from attacks as to its ownership of the auctioned property.

[29] As such, as the defendants had asserted the material fact that their units on the ground floor in the building ought not to be included in the sale as publicly proclaimed pursuant to P3, it was, with respect, incumbent on them to prove that material fact. This, they could prove in court, by calling the very witnesses that they had identified that ought to have been called by the plaintiff. Section 101 of the Evidence Act 1950 states that one who alleges a fact has the burden of proving it. Section 106 of the Evidence Act 1950 further provides that if a particular fact is within the special knowledge of a person, then he must prove such fact. Clearly in this case, the allegation that the units on the ground floor of the building rightfully belonged to the defendants must have been premised on such fact having been in the special knowledge of the defendants. Such fact was definitely not in the knowledge of the plaintiff, whose knowledge of the building was based almost entirely on the contents of P3.

[30] As an appeal court, this appeal court is entitled to look at all the evidence adduced during the trial proceedings that have since formed part and parcel of the records of appeal. An appeal is a continuation of the hearing, it had been held. That is trite law.

[31] Looking at P3, there was no express provision therein that had spelt out units in the building which were to be *excluded* in the sale. On the contrary, there was a provision, as could be seen above, which expressly provided that certain four units that had been identified to be included as part of the building that was up for sale.

[32] Before us, learned counsel for the defendants submitted the application of the maxim, 'expressio unius est excluso alterious' which means *the express of one matter implies the exclusion of matters which have not been mentioned*. The case of *Foo Tseh Wan v Toyota Tsusho (M) Sdn Bhd & Anor* [2018] 9 MLJ 664 ('the *Foo Tseh Wan* case') was cited before us to illustrate the operation of that principle. That case had been concerned with the interpretation of a certain statutory provision in the Malaysian Anti-Corruption Act 2009 ('the MACC Act') and the question before the learned HCJ there was whether a statement recorded from a suspect under s 53 of the MACC Act can be *used in other* legal proceedings *apart from* a proceeding pertaining to an offence under the MACC Act under which that statement was recorded. Suffice for us to say here that on the facts of the *Foo Tseh Wan* case the application of that maxim may well be apt.

In that *Foo Tseh Wan*'s case, the accused person had a litany of charges proffered against him for offences under the MACC Act. In the course of investigations into those charges, a statement was recorded from him under the MACC Act. At the same time, he was also facing a civil suit from his former employer for a number of tortious acts allegedly perpetrated by him against his employer during the course of his employment with the latter. Thus the question as alluded to above that arose before the learned judge. Section 53(1) of the MACC Act reads as follows:

> (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to question, by an accused person to or in the hearing of any officer of the Commission, whether or not interpreted to him by any other officer of the Commission or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

[33] Having considered the submissions by parties before him, the learned HCJ concluded as follows:

> [88] Section 53(1) of the MACC states that the statement can only be used in any 'trial or inquiry by a court into an offence under this Act'. I agree with the submission of learned counsel for Applicant that this attracts the application of the maxim of construction, expressio unius est exclusio alterius, namely the express mention of one matter, implies the exclusion of matters which have not been mentioned. The application of this maxim would thus exclude the statement from being utilised for any other purpose than that expressly mentioned.
>
> [89] In the final analysis, pursuant to section 53(1) of the MACC, the statement is only admissible at the trial of the Applicant and, if he tenders himself as a witness, the statement may be used in cross-examination and for the purpose of impeaching his credit. The trial referred to means the trial of the Applicant at the criminal Sessions Court and not in any other court.

[34] That having been said, nevertheless, in the context of the factual matrix in this appeal before us, in light of the express terms of both the order for sale and the proclamation of sale, there was no necessity to invoke the application of this maxim *expressio unius est excluso alterious* in aid of coming to the conclusion as to whether the defendants' units on the ground floor were part and parcel of the building up for judicial sale by way of public auction. As it will become clear in the ensuing paragraphs in this judgment, the answer will become rather obvious.

[35] With respect, *Foo Tseh Wan*'s case can be distinguished on the facts there obtaining before the High Court. On the facts of that case, it was clear that the

statement recorded from the accused person could only be used in proceedings involving the prosecution of an offence under that Act. It could not be used in a civil suit involving the accused person. But in this case, from a perusal of both the documents, namely the order for sale and the proclamation of sale, the defendants' units on the ground floor or the impugned units were never expressly referred to in either of the said documents. In the order for sale, they were *not* singled out as being *excluded* from the sale. In the *subsequent* proclamation of sale documents, they were *not* expressly singled out as being *included* in the sale. We are of the view that as the defendants' units were *not* excluded from the sale in the order for sale, they *remained as such* in the subsequent proclamation of sale and therefore there was no need for them to be expressly declared as being up for sale. It is therefore our considered view that they (ie the defendants' units on the ground floor) being omitted from express mention in the same breathe as the four identified units on the first floor and second floor of the building, in the proclamation of sale was because they remained as part and parcel of the building and thereby the said property that was subject to be sold in the order for sale wherein which they were not expressly excluded.

[36] So in the context of the situation regarding the state of play, on the question of proof, on whose shoulder ought the onus be placed to be discharged accordingly? In our view, the plaintiff had brought the evidence it needed to show that the building/said property it had purchased had comprised those as described in the proclamation of sale, including the units claimed by the defendants as having been bought by them, as per the respective sale and purchase agreements. We pause here, to reiterate that the sale and purchase agreements entered into by the defendants in relation to the ground floor units in the building were dated in 1995 and 1996. The order for sale was issued in 2004 by the High Court in Johor Bahru.

[37] Back to the burden of proof, the plaintiff was proving an affirmative assertion in that regard as evidenced by the proclamation of sale. On the other hand, the defendants were averring that their units must not be up for sale as, according to them and agreed to by the learned HCJ, if that were to be the case, their units too must have been singled out to be included for sale, just like the units that were expressly mentioned in the proclamation of sale. In this situation, they were trying to speculate the true meaning of the proclamation of sale by reading into it words which were not there. It is our view that the burden was on the defendants to prove that their units were exempted or excluded from the sale, not on the plaintiff.

[38] The word 'including' appearing in the phrase '(including four (4) units of shops: First floor — F8, F9 and F18. Second floor — S9)' under 'Description' in the proclamation of sale at p 83 *Ikatan Teras Bersama Jld* 1 has

an inclusive meaning. It means in addition to what was already part of the existing building. In a situation where there appears to be an ambiguity as to its meaning, as alleged to be the case by the defendants in this case, it was therefore incumbent on the defendants to seek clarification from the relevant witnesses concerned with the drafting of the proclamation of sale to throw some light as to it true meaning, to wit, whether by expressly stating the units to be included in the sale, the omission to mention the ground floor units must be taken to mean that those latter units were not meant to be up for sale as part of the building. That was their allegation of fact, and it was therefore on them to discharge the onus of proving that fact, namely that their units were exempted from the sale. As alluded to earlier by us, the proclamation of sale documents did not have any express provision that exempted any units in the building from the sale. Instead, via its provision on 'Description' it had expanded the scope of the sale to further include certain units which were specifically identified therein. In the context of this case, the defendants' units were not mentioned in the 'including' phrase because it was already part of the building that was meant to be sold off.

[39] Reverting to this appeal before us, it is important to reiterate that the proclamation of sale document (P3) did not have any provision that had the effect of exempting any units in the property from being sold. On the contrary, in the 'Description' provision, it provided, affirmatively the four units, namely F8, F9 and F18 and S9 were to be included in the sale. In this regard, the newly-adduced evidence order for sale has the effect of amplifying this point on 'exemption'. It is stated in the order for sale para 1, inter alia, like so:

> ... dan bangunan yang didirikan di atas tanah tersebut (kemudian dari ini dirujuk sebagai 'hartanah tersebut') dan kepunyaan pihak Defendan seperti dinamakan di atas *dijual melalui lelonqan awam* di bawah arahan Penolong Kanan Pendaftar atau Timbalan Pendaftar Mahkamah Tinggi Malaya *kecuali* unit-unit berikut:-
>
> Tingkat Satu:- F1-F7, F10-F17, F19-F28
>
> Tingkat Dua:- S1-S8, S10-S17. (Emphasis added.)

[40] So, in actual fact, the proclamation of sale and the order for sale had gone out to describe the same property that was up for sale by way of judicial public auction, differently. While the proclamation of sale described the property in an affirmative and inclusive manner, the order for sale had described the property by way of exclusion or exemption. The proclamation of sale *included* as part of the property for sale the four identified units as described therein. The order for sale specifically *excluded* the units so described therein from being subject of the sale.

[41] But the order for sale has one more evidential value and purpose. It is this. It shows, as a piece of historical evidence, that even when the property was first up for sale by way of a court order in 2004, the units that existed on the

ground floor of the building were never exempted or excluded from the intended sale. In fact, from a perusal of the order for sale, no units on the ground floor were excluded, or *dikecualikan* from the sale. Such omission, to our minds, could not have been more conspicuous.

[42] Viewed from another way, the positive and affirmative reference to the four units as being included in the sale can be quite easily appreciated. These four units, by reference to the order for sale, were units that were not excluded from the sale on the respective floors mentioned therein. It would appear that as regards F8 and F9, they were intervening units between F7 and F10 and, as for F18, it was the unit between F17 and F19 on the first floor (*tingkat satu*). As for S9, it was the unit between S8 and S10 on the second floor (*tingkat dua*).

[43] As such, we find that there is no basis for the defendants to allege that their units that existed on the ground floor of the building did not form part of the building subject to be sold. The impugned units were not excluded for sale in the order for sale. By way of necessary implication, the inevitable inference therefrom must be that they formed part and parcel of the building to be sold in the order. In the subsequent proclamation of sale, they were not mentioned because pursuant to the order for sale, they were not excluded from such sale. There was therefore no need to refer to them there. They remained as units that were included in the sale. As for the four units that were singled out in the proclamation of sale, it must necessarily mean that it was done for clarity, in view of the exclusion of the units on the respective floors as mentioned in the order for sale.

[44] As such, we are of the respectful view that the maxim *expressio unius est excluso alterious* has no application in the circumstances of this case. As the defendants failed to prove that their units ought to be excluded from the public auction of the building, they had failed to prove their case as they had failed to call witnesses to help establish their case.

[45] Then there is another reason as to why the decision of the learned HCJ could not be sustained as a matter of law. The facts of this case had put into focus the position of the defendants as purchasers of the units on the ground floor from the developers of the building and that of the plaintiff who was the successful bidder at the judicial auction pursuant to a statutory order under the National Land Code. It must be stated here that the transactions between the defendants and the developer were transactions that were rooted under contract, therefore in personam in character. On the other hand, the plaintiff's purchase was a statutory sale, involving a public auction under judicial supervision, was one that is in rem, namely against the whole world. In this kind of situation, it is not that the defendants would have no remedy at all.

Their remedy would, ipso facto, depending on the terms of the contract between them and the developers, be available against the developer. A

[46] In that regard, we agree with the submissions of learned counsel for the plaintiff when he submitted, as follows: B

> As a successful bidder at a judicial sale/public auction conducted by the Court pursuant to the National Land Code, the Appellant obtains an indefeasible title to the Subject Property — through the Chargee whose interest under the Charge is indefeasible.

[47] The Supreme Court's case decision of *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 ('the *Gondola* case') was cited before us. In that case, it was held at p 659, like so: C

> Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. *The error in this* case was *to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the* issue *of the certificate of sale.* (Emphasis added.) D

[48] It is also not in dispute that a certificate of sale (Form 16F) had been issued by the court to the plaintiff, who had paid the full purchase price for the property. Form 16F is registrable as an instrument of dealing and has the effect of vesting the title to the property that he purchased at the public auction, pursuant to s 267(1) read with s 259(3) of the National Land Code. In the absence of any voiding or vitiating factors, (in respect of which there was none) the plaintiff obtains a good and indefeasible title in the property that he had purchased at the public auction (see the case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269). E F

[49] To our minds, the *Gondola* case clearly puts in perspective the proper position of the plaintiff and the defendants inter se in terms of whose title over the impugned unit would prevail. In the context of this case before us, we have no difficulty in concluding that the plaintiff has a better claim to the title of the auctioned property that included the ground floor units claimed by the defendants as theirs. G H

[50] The case of *Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd')* [2016] 2 MLJ 819 ('the *Rohaya* case') indeed deserved some mention before this court and the learned counsel for the plaintiff was correct in citing this case before us. I

[51] Now, the nett result of the *Rohaya* case would point to the fact the impugned units could be salvaged and be exempted from the statutory sale if

the purchaser of the impugned units had made arrangements with the chargor/developer in the manner as described therein. But, in this case, no such arrangement was made between the defendants and the developer, being the chargor who put up the property in a charge registered in favour of the chargee bank who had extended a loan to the chargor/developer. In other words, the impugned units of the defendants were not excised from the impending sale by way of public auction.

[52] In view of the judicial sale and in view of the proclamation of sale (P3) it is obvious that the learned HCJ was functus officio in the sense that it could not go against the prior order for sale which had the effect of authorising the sale of the property as described in the proclamation of sale. It does not escape our notice by term 11 of P3, the sale shall prevail over any mistakes that may later be discovered in relation to the property. It even said that no damages shall be payable by the successful bidder pursuant to the sale by public auction in respect of the said property. Again the case of *Rohaya* is valid authority for the proposition on the functus officio effect which arises in a factual situation that obtained before the learned HCJ. In the circumstances, it was not open to him to rule in a manner that was diagonally opposite to what had been previously decided which outcomes had found expression in the order for sale in 2004 and the subsequently the proclamation of sale in respect of the property described in those public documents. As such, the learned HCJ's ensuing decision in this case that had favoured the defendants is void and is of no effect. It follows that premised on the above, the plaintiff's prayers as per its statement of claim must be granted and judgment must be entered in its favour with costs.

[53] Perhaps, it would be opportune to cite the observation by the Court of Appeal in *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34 at p 59 therein:

> [51] ... Yet another known and foreseeable risk is the fact that the master title will be charged by the developer to a banking institution for a bridging loan. Consequently, *the purchaser runs the risk that his right over his parcel may be subject to the registered charge on the master title. In the event that the developer defaults and fails to pay the chargee, the entire land will be sold in a foreclosure proceeding* and to borrow the words of Buckley LJ in the *John Walker*'s case, 'this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase.
>
> [52] Now, when the respondents gave their consent to the developer to charge the master title to Public Bank Berhad, the risk that the said bank may foreclose the land and their property was a risk which the respondents shouldered, and to borrow the words of Buckley LJ in the John Walker's case, 'any loss that may result from the maturing of that risk is a loss which must lie where it falls'. And *the fact that the respondents expressly consented to the developer charging the master title to the said bank meant that the respondents were willing to shoulder the risk of foreclosure on the master title in the event that the developer defaulted in paying the loan and the potential loss of*

the property arising from the foreclosure. In our judgment, this result is within the reasonable contemplation of the respondents in consenting to the creation of the charge pursuant to cl 5.34 of the SPA. (Emphasis added.)

[54] We find such observation to be apt and helpful, in the context of this case. By entering into the sale and purchase agreements with the developer, knowing fully well the status of the titles to the properties, the defendants knew the risk involved and they took that risk. They had no defence against a claim mounted by the plaintiff whose claim to ownership of the auctioned property is founded upon sterner and firmer statutory ground as explained in the above paragraphs of this judgment.

THE COUNTERCLAIM FOR A DECLARATION BY FIRST DEFENDANTS

[55] In light of our decision that favours the plaintiff, the counterclaim by the first defendant cannot be sustained. Simply put, in light of the fact that the plaintiff has a better title in the property he had purchased in the public auction, it would be impossible for the learned HCJ to exercise his discretion by granting the declaration that was sought for by the first defendant. It is a legal impossibility, its hands would be tied. On the requirements for granting a declaration, the Court of Appeal decision in *Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333; [2017] 2 MLRA 578 is indeed instructive.

[56] So, going back to the equation pertaining to this case, it was definitely not enough for this case to be completely and properly determined by answering the question posed as to who owned the units on the ground floor of the building that was up for sale. The answer to that question will only serve to satisfy a portion of the bigger issue that invariably would include points of law on land law, among others. We are not oblivious to the objections raised by learned counsel for the defendants that the issues raised by the plaintiff before us, were not pleaded. With respect, the issues raised are legal issues and conclusion of law should not be pleaded, as it can be raised at any time (see, for example *Song Lian Chye & Ors v Tai Kian Cheong t/a Tai Kian Cheong & Co* [1983] 2 MLJ 222 (FC)). For example, the plaintiff submitted that the learned High Court was functus officio in light of the plaintiff bought the building at a public auction pursuant to an order for sale and a proclamation of sale. It has been a statutory sale pursuant to the provisions under the National Land Code. The Court of Appeal in the *Rohaya*'s case had succinctly put it, among others, like so:

... the High Court is functus officio in respect of all proceedings under the Order For Sale and the High Court has no power to set aside the Order For Sale *nor any*

A *power to make any decision which has the effect of setting aside the Order For Sale or part thereof.* (Emphasis added.)

B **[57]** In this case, clearly the effect of the decision of the learned HCJ was akin to 'setting aside the order for sale' and has the effect of setting aside the order for sale or part thereof. The crux of the matter may be encapsulated as follows: With the evidence that has flown across the face of this court, could this court allow a legally tenuous position vis a vis the parties to remain as decided by the learned HCJ? To allow that to happen would amount to this court condoning an illegal situation to persist, albeit the fact that it has emanated from a court order. We agree with the observation made by the Supreme Court in the *Gondola*'s case that the error that was patent in the decision of the learned HCJ lies in the fact that it ignored the indefeasible title of the chargee, which same title was passed down to the plaintiff when he was successful in his bid for the same property at the public auction. We are unanimous that the decision of the learned HCJ, with respect to the order was entirely erroneous and ought not to be allowed to remain to take its normal course to completion to the detriment of the plaintiff, who under the law is the party rightfully entitled to the property in question. That order by the learned HCJ was made in defiance of an existing and valid previous orders by the HCJ issued by the High Court at Johor Bahru. Following *Rohaya*'s decision those orders had, in essence, rendered the learned HCJ in this case functus officio.

F **[58]** As was earlier alluded to by us, the remedy of the defendants, if any, lies with the developer with whom they have contracts in personam to fall back onto and enforce. But the plaintiff's claim is on a stronger footing and it is good as against the entire world. It has a right that is rooted in rem.

G **[59]** As a matter of law, an appellate court is not justified to disturb any decision of the trial court just because the appeal court happens to have a different take on the outcome of the case. To disturb or overturn the decision of the trial court, it must be convinced that the HCJ must be plainly wrong in his decision (see, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). On the perusal of the evidence and in light of the applicable legal principles, we are of the unanimous view that the learned HCJ was plainly wrong in the terms, as described in the English Supreme Court in *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 ('the *Henderson*'s case') when it considered and explained the 'plainly wrong' test, as follows:

I 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same

conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. *What matters is whether the decision under appeal is one that no reasonable judge could have reached.* (Emphasis added.)

CONCLUSION

[60] In the upshot, we allow this appeal with costs. Judgment is entered in favour of the plaintiff. The counterclaim by the first defendant is dismissed. We set aside the decision of the learned HCJ and all the orders that were consequential to that decision. Deposits, if paid, shall be refunded to the plaintiff, being the appellant in this case. Order accordingly.

Appeal allowed with costs.

Reported by Dzulqarnain bin Ab Fatar